

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**PHOENIX C & D RECYCLING, INC;
Permit No. 77-SDP-53-04P-PRO
Polk County, Iowa.**

**ADMINISTRATIVE
CONSENT ORDER**

NO. 2009-SW- 03

**TO: Robert J. Colosimo
Phoenix C & D Recycling, Inc.
1817 Euclid Ave.
Des Moines, IA 50313**

I. SUMMARY

This Administrative Consent Order (Order) is entered into between Phoenix C & D Recycling, Inc. (Phoenix) and the Iowa Department of Natural Resources (Department) in order to resolve continuing violations at the Phoenix processing facility located at 1817 Euclid Ave., Des Moines, Iowa. This Order is entered into to resolve a pending contested case in which the Department has sought the revocation of Permit No. 77-SDP-53-04P-PRO.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

Chad Stobbe
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
515-242-5851

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034

II. JURISDICTION

This Order is issued pursuant to Iowa Code section 455B.307(2) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division IV, Part 1 (solid waste), and the rules adopted pursuant to that part; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) 10, which authorize the Director to assess administrative penalties.

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III. STATEMENT OF FACTS

1. Phoenix is engaged in the business of recycling construction and demolition (C & D) waste. C & D waste is received by Phoenix at its facility in Des Moines, Iowa. Recyclable materials are removed from the waste. The recycling process generates residual materials. Some of the residual material can be used as alternative daily cover at landfills. Some of the wood residual is processed into fuel.

2. On June 18, 2007, the Department renewed permit no. 77-SDP-53-04P-PRO authorizing Phoenix to accept C & D waste at its facility at 4764 N.E. 22nd Street, Des Moines, Iowa. Special provision 2(b) of the permit prohibits the outdoor storage of any pre-processed or post-processed C & D wastes. Special provisions 2(c) through 2(e) limit the indoor storage of materials to 72 hours, but a variance has been issued which allows the storage of residual materials for 10 days if stored indoors.

3. On October 30, 2007, the Department visited the Phoenix processing facility in response to a report of a fire on site. The neighboring business, Barton Solvents, was experiencing a major fire at the time. A large pile of processed or semi-processed material consisting primarily of wood was on fire. The pile was located outdoors to the southwest of the Phoenix processing building. A contractor retained by Barton Solvents was attempting to extinguish the fire. A second pile of the same material was observed to the southeast of the processing building. Phoenix reported that more of the material was being stored in a separate building near the Phoenix property. Photographs were taken.

4. On November 1, 2007, a Notice of Violation was issued to Phoenix for violation of the storage requirements in the permit and for failure to have financial assurance for the off-site storage. The Notice of Violation noted that similar storage violations had occurred in 2006.

5. On November 6, 2007, the Department met with representatives of Phoenix at the processing facility. At that time, the pile to the southeast had been removed. The other unauthorized pile remained.

6. On November 9, 2007, the Department sent a letter to Phoenix authorizing the disposal of the contaminated materials, being all materials then located on the site, to the Metro Waste Authority landfill.

7. On December 10, 2007, the Department inspected the Phoenix processing facility. It was determined that almost all of the unauthorized pile remained.

8. On January 3, 2008, the Department inspected the Phoenix processing facility. A new hoop building was observed to have been constructed to house the pelletizing equipment. All waste was indoors except approximately six roll-off containers

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containing processed or partially processed material to the east of the main building. The material stored offsite was reported to be scheduled for removal by January 15, 2008.

9. On February 7, 2008, the Department inspected the Phoenix processing facility. A pile of processed wood pellets was observed outdoors to the east of the new hoop building. Additional piles of processed or partially-processed material were observed to the west of the hoop building and to the northeast of the north processing building. Phoenix was notified that such outdoor storage is prohibited.

10. On February 8, 2008, a Notice of Violation was issued to Phoenix due to the outdoor storage violations. The Notice instructed Phoenix to stop accepting waste until the materials storage deficiencies were resolved.

11. On February 19, 2008, the Department inspected the Phoenix processing facility. The outdoor piles remained.

12. On February 27, 2008, the Department met with representatives from Phoenix to discuss the ongoing issue with outdoor piles of pre- and post-processed C&D waste at the processing facility and what issues need to be addressed to categorize the C&D pellets as a refuse derived fuel (RDF). Phoenix was notified that it would have thirty (30) days to properly dispose of the onsite piles.

13. On March 5, 2008, the Department issued a letter to Phoenix reiterating the issue of outdoor storage and set an April 1, 2008 deadline to properly dispose of all outdoor stockpiles of post-processed C&D waste onsite and all material stockpiled offsite. Phoenix has been using its C & D residual materials as an approved fill material at a site in Madison County pursuant to a beneficial use determination issued by the Department. In the late winter and spring of 2008, Madison County officials prohibited Phoenix from using rural roads to access the BUD site. Therefore the residual materials could not be taken to the expected site of end use. The Department was aware of this issue.

14. On March 18, 2008, the Department's Solid Waste and Air Quality staff facilitated a meeting with Iowa State University and Phoenix regarding the use of C&D RDF pellets as a supplemental alternative fuel source for the University's power plant.

15. As of April 10, 2008, Phoenix had not removed the material improperly stored.

16. On April 14, 2008, the Department issued a Notice of Violation to Phoenix due to the outdoor storage violations and non-compliance with the April 1, 2008 cleanup deadline.

17. On June 3, 2008, the Department issued a Notice of Rescission of Solid Waste Processor Permit to Phoenix due to continuing noncompliance with outside storage prohibitions contained in Permit No. 77-SDP-53-04P-PRO.

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18. On July 2, 2008, Phoenix filed a timely Notice of Appeal contesting the rescission of the permit and indicating that all post-processed C & D material would be removed within 45 days (August 16, 2008). The bulk of the material was material originally intended for use at the Madison County site, but never delivered because of inclement weather, the road embargo imposed by Madison County, and Phoenix's agreement with the Department to terminate the BUD.

19. Phoenix did not remove the post-processed C & D material that was illegally stored outside by August 16, 2008.

20. On September 5, 2008, the Department filed a Petition to Revoke Permit. Phoenix remained in noncompliance with outdoor storage prohibitions as of that date.

21. On September 10, 2008, the Department of Inspections and Appeals issued a Notice of Hearing setting the permit revocation action for hearing on October 29, 2008.

22. On October 1, 2008, Phoenix filed an Answer to the Department's Petition.

23. On October 16, 2008, Phoenix moved for a continuance of the contested case hearing.

24. On November 10, 2008, a hearing on the Motion to Continue was held and the matter was reset for December 19, 2008.

25. On December 15, 2008, Phoenix filed a second Motion for Continuance of Contested Case Hearing. The Motion indicated that all post-processed C & D material would be removed by the first week of January 2009.

26. By Continuance Order dated December 17, 2008, the contested case hearing in this matter was reset for January 29, 2009.

27. Phoenix failed to remove all post-processed C & D material by the end of the first week of January, 2009. As of January 23, 2009, post-processed C & D material was being stored outdoors in violation of Permit No. 77-SDP-53-04P-PRO.

IV. CONCLUSIONS OF LAW

The Department and Phoenix agree that the following Conclusions of Law are applicable to this matter:

1. Iowa Code section 455B.304 provides that the Environmental Protection Commission (Commission) shall establish rules governing the handling and disposal of

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solid waste. The Commission has adopted such rules at 567 IAC chapters 100-123.

2. Iowa Code section 455B.301(20) provides, in part, that "solid waste" means garbage, refuse, rubbish, and other similar discarded solid or semisolid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities.

3. Iowa Code section 455B.305(1) provides that the Director shall issue, revoke, suspend, modify or deny permits for the construction and operation of sanitary disposal projects.

4. Iowa Code section 455B.301(18) defines a "sanitary disposal project" as all facilities and appurtenances including all real and personal property connected with such facilities, which are acquired, purchased, constructed, reconstructed, equipped, improved, extended, maintained, or operated to facilitate the final disposition of solid waste without creating a significant hazard to the public health or safety, and which are approved by the executive director.

5. The Department has adopted 567 IAC chapter 102 "Permits" and 567 IAC chapter 104 "Sanitary Disposal Projects with Processing Facilities" in order to carry out the provisions of sections 455B.304 and 455B.305 of the Iowa Code.

6. Permit No. 77-SDP-53-04P-PRO has been issued to Phoenix pursuant to 567 IAC chapter 102 and 567 IAC chapter 104.

7. Pursuant to special provision 2(a) of Permit No. 77-SDP-53-04P-PRO, the storage of pre and post-processed C & D wastes outdoors is prohibited. Phoenix has violated this permit provision. The outdoor storage of concrete and recyclable metal are not prohibited by this provision.

8. The Department and Phoenix agree that the term outdoor storage, as prohibited by special provision 2(a) of Permit 77-SDP-53-04P-PRO means the dumping, auguring, placing or otherwise depositing of material in an area not covered by a fixed roof which has been approved as a storage area by the Department. The auguring of materials to an outdoors location during processing is prohibited by this provision unless the material is deposited directly into a vehicle for transport. The outdoor storage of concrete and recyclable metal is not prohibited by this provision.

9. Pursuant to special provisions 2(c) through 2(e) of Permit No. 77-SDP-53-04P-PRO and 567 IAC 104.10(5)(a), no materials or solid waste may be stored at the Phoenix site for longer than 72 hours. Phoenix has violated these permit provisions.

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V. ORDER

The Department orders and Phoenix hereby agrees to:

1. Beginning January 29, 2009, Phoenix shall pay a stipulated penalty of \$500 per day, excluding Saturdays and Sundays, for each business day that concludes in a state of noncompliance until Phoenix achieves compliance with special provision 2(a) of Permit No. 77-SDP-53-04P-PRO by the removal from the site of all material stored outdoors. If the material being stored outdoors as of January 29, 2009 is not removed by February 13, 2009 then the stipulated penalty shall increase to \$1000 per day, excluding Sundays, until Phoenix achieves compliance with special provision 2(a) of Permit No. 77-SDP-53-04P-PRO.

2. Beginning on the date that compliance with Paragraph 1, above, is achieved and continuing until June 18, 2010, if the Department documents that any violation of Special Provision 2(a) of Permit 77-SDP-53-04P-PRO exists then a stipulated penalty of \$1,000 per day shall be immediately imposed without the need for further action by the Department. Said penalty shall be due and payable within 10 day of the issuance of a Notice of Violation by the Department.

3. Beginning on the date that compliance with Paragraph 1, above, is achieved and continuing until June 18, 2010, if the Department documents any ten consecutive calendar days of noncompliance by Phoenix with Special Provision 2(a) of Permit 77-SDP-53-04P-PRO then Permit No. 77-SDP-53-04P-PRO shall be deemed consensually revoked effective on that date without the need for additional action by the Department unless such violation resulted from extraordinary occurrences, force majeure, acts of God, or acts of the Department. Noncompliance shall not be excused based upon the unavailability of any market or end user of post-processed material. If any other violations, unrelated to Special Provision 2(a) are observed during an inspection that occurs within the period January 29, 2009 through June 18, 2010, then Phoenix shall correct those violations within 30 days or the permit shall be deemed consensually revoked unless such violation resulted from extraordinary occurrences, force majeure, acts of God, or acts of the Department.

4. Nothing in this Order shall preclude the initiation of a future permit revocation action based upon noncompliance occurring on or after February 15, 2009.

VI. PENALTY

1. Iowa Code section 455B.307(3) provides for civil penalties of up to \$5,000 per day for solid waste violations.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000 that may be assessed administratively. The

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Commission has adopted this schedule with procedures and criteria for assessment of penalties at 567 IAC chapter 10. Pursuant to this chapter, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an order with stipulated penalties. The administrative penalty assessed by this Order is determined as follows:

a. Economic Benefit. The Department asserts that Phoenix has achieved a substantial economic benefit from its illegal conduct. Costs avoided include storage costs, disposal fees, labor, and hauling costs. Phoenix asserts that it has acted in good faith and has not realized an economic benefit. In order to resolve this matter consensually and expedite the removal of the materials, the parties have agreed to forego an upfront penalty. The stipulated penalties contained herein incorporate the economic benefit realized by Phoenix.

b. Gravity of the Violation. One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for the type of violation. The outside storage violations cited in this Order pose a risk of fire, fugitive dust, and storm water violations. Phoenix asserts that said violations were temporary in nature and caused by the actions of Metro Waste Authority. Phoenix produced and stored the residual materials under contract with Metro Waste Authority and Phoenix is in litigation against Metro Waste Authority for breach of that contract. In order to resolve this matter consensually and expedite the removal of the materials, the parties have agreed to forego an upfront penalty. The stipulated penalties contained herein incorporate the penalties justified by this factor.

c. Culpability. Phoenix has been informed of the applicable regulations and given the opportunity to achieve compliance without the necessity of an enforcement action or penalty. Phoenix has made repeated promises of compliance but has made only minimal efforts to fulfill those promises. Phoenix is engaged in the business of the recycling of C & D waste. This business necessarily generates residual materials and processed materials. The proper disposition of these is a routine part of C & D recycling and Phoenix must maintain a viable and lawful disposition option. Phoenix has attempted and is attempting to locate viable alternatives to market or dispose of residual materials since Metro Waste Authority has refused to accept the material as planned and intended. The failure to do so can not justify the violations documented herein and justifies the imposition of civil penalties. In order to resolve this matter consensually and expedite the removal of the materials, the parties have agreed to forego an upfront penalty. The stipulated penalties contained herein incorporate the penalties justified by this factor.

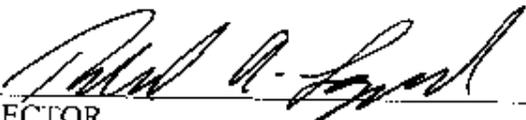
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VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.308 and 561 IAC 7.5(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Commission. This Order is entered into knowingly by and with the consent of Phoenix. By signature to this Order, all rights to appeal this Order are waived.

VIII. NONCOMPLIANCE

Failure to comply with this Order may result in the imposition of administrative penalties or referral to the Attorney General to obtain appropriate relief pursuant to Iowa Code section 455B.307. Compliance with provisions 1 and 2 of part "V. Order" of this Order constitutes full satisfaction of all requirements pertaining to the violations described in Divisions III and IV of this Order. The Department reserves the right to bring enforcement action or to request that the Attorney General initiate legal action to address other violations not described in this Order but which may arise from the facts summarized in Division III of this Order. The Department reserves the right to issue an administrative order or to refer to the Attorney General's Office in lieu of collecting stipulated penalties pursuant to this Order.



DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 9 day of
Feb, 2009



PHOENIX C & D RECYCLING, INC.

Dated this 2nd day of
February, 2009